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No. 96-1493

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term 1996

ARDITH CAVALLO,

Petitioner,

v.

STAR ENTERPRISE; TEXACO REFINING AND MARKETING (EAST), INCORPORATED; SAUDI REFINING, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Supplemental Brief for Petitioner

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On October 20, 1997, the United States Court of Appeals for the Fifth Circuit issued its decision in *Moore v. Ashland Chemical, Inc.*, No. 95-20492.[1]

Moore presents a further important conflict with the Fourth Circuit's decision in this case (A.1-22),[2] which upheld the district court's exclusion of the testimony of Mrs. Cavallo's internationally prominent treating physician, Dr. Joseph Bellanti, head of the Department of Allergy and Immunology at Georgetown Medical Center. Specifically, *Moore* holds that a treating physician's testimony as to causation of an illness is not subject to the *Daubert*[3] factors applicable to "hard science." Thus, even applying a highly deferential abuse of discretion standard of review, the Fifth Circuit reversed the exclusion of a treating physician's testimony, based on clinical procedures and differential diagnosis.[4]

The facts in *Moore* are strikingly similar to those in the instant case. Moore was exposed to vapors from a mixture of spilled chemicals. Thereafter, he became ill and was diagnosed with Reactive Airways Dysfunction Syndrome ("RADS"), a disease that can be caused by "any chemical with irritating properties . . . in a person who is capable of responding in that way" (Slip. Op. at 508). [5] A

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[1] Twelve (12) copies of the Opinion have been lodged with the Clerk. The case is reported at 126 F.3d 679.

[2] "A." references are to the Appendix to our Petition.

[3] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[4] The defense judgment in *Moore* was a jury verdict rather than summary judgment. Reversal was based on the Fifth Circuit's conclusion that the exclusion was not "harmless error" and that "substantial rights" likely were affected. Slip Op. at 520-521.

[5] Mrs. Cavallo was diagnosed with "obstructive pulmonary disease" longer after the exposure than Moore, and the ultimate RADS diagnosis came later. *See* Reply to Br. in Op. at 2. These differences may go to the weight of the testimony. They do not affect admissibility.

treating physician proposed to testify that the exposure to the spilled chemicals caused Moore's illness. He could not state the precise level of exposure or cite studies. The district court refused to admit the testimony.[6]

Unlike the district court in this case, which ruled (affirmed by the Fourth Circuit (A. 20-21)) that the methodology of a treating physician is to be evaluated by the factors applicable to determining the reliability of "hard science", the Fifth Circuit concluded (Slip Op. at 493, numbers in parentheses omitted):

> clinical medicine (as opposed to research and laboratory medical science) is not a hard science discipline; its goals, subject matter, conditions of study and well developed methodology are sui generis and quite different from that of hard science and its methodology; consequently, a trial judge assessing the reliability of the proffer of a clinical physician's expert testimony based on clinical medical knowledge should determine whether it is soundly grounded in the knowledge, principles and methodology of clinical medicine; the "*Daubert* factors," which are techniques derived from hard science methodology, are, as a general rule, inappropriate for use in making the reliability assessment of expert clinical medical testimony.

See Slip Op. at 500-502, 507-512, 516-518, 522-524. *But see* Slip Op. at 527-529 (dissenting opinion), citing, *inter alia* (at 528), the Fourth Circuit's decision in this case.

Contrary to the Fifth Circuit, the Fourth Circuit in this case held that the district court could validly require that clinical medicine must be proven reliable by use of

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[6] The chemicals in the mixture included some of the same chemicals involved in the spill in this case. *See* A. 42 and Slip Op. at 506.

methodologies applicable to hard science. *See* A. 19-21 (Fourth Circuit); A. 33-34, 54-63 (district court). The Fifth Circuit majority clearly is correct, particularly where there is highly reputable and credible medical testimony that to determine that chemicals caused an illness, knowledge of the precise exposure level is unnecessary. As we stated in our Petition at 7n.9, the Fourth Circuit's decision in this case conflicts even with other Fourth Circuit authority. *See* Slip Op. at 519, citing *Benedi v. McNeil-P.P.C.,Inc.*, 66 F.3d 1378, 1383 (4th Cir. 1995). *See* also Brief *Amicus Curiae* of Ardith Cavallo in *General Electric Co. v. Joiner*, No. 96-188, at 17-19.[7]

In sum, *Moore* presents and highlights important circuit conflicts, and provides additional reasons to grant *certiorari* and reverse the Fourth Circuit's decision in this case. That is so regardless of the standard of appellate review applicable to district court *Daubert* rulings. While we believe the Fourth Circuit erroneously applied an incorrect standard of review, even if it used a correct standard, it applied that standard in an erroneous manner.

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[7] The *amicus* brief has been furnished to counsel for Respondents.